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No. 90-6371

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

FRANK D. RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DUANE WOODARD
Attorney General

CHARLES B. HOWE
Deputy Attorney General

RICHARD H. FORMAN
Solicitor General

ROBERT M. PETRUSAK
Assistant Attorney General
Appellate Section

Attorneys for Respondent
State of Colorado

110 Sixteenth Street, 10th Floor
Denver, Colorado 80202
Telephone: (303) 620-4551

QUESTIONS PRESENTED FOR REVIEW

1. Whether exclusion of facts relating to prison conditions, lethal gas, and other cases in which the death penalty was not sought presents a cognizable claim particularly where petitioner's evidence opened the door to much of the prosecutorial comment of which he now complains?

2. Whether the prosecution's description of the victim's suffering and death in graphic, personalized terms, and its comments on the role of the jury denied petitioner an individualized sentencing determination?

3. Whether the instructions, particularly when taken as a whole, would have led reasonable jurors to believe that unanimity was required before any matter could be considered in mitigation?

4. Whether petitioner's constitutional rights were implicated by instructions which allowed the jury discretion to find a death sentence inappropriate after that jury found beyond a reasonable doubt that there was statutory aggravation which outweighed any and all mitigation?

5. Whether petitioner's admission of the statutory aggravators, the overwhelming evidence of abuse, torture, and suffering distinct and apart from the causing of a death, and the proof of other substantial statutory aggravation rendered harmless any failure to limit the aggravator for "especially heinous, cruel,

or depraved" killings?

6. Whether the jury instructions and statements of counsel sufficiently apprised the jury of the finality of its sentencing decision?

7. Whether the prosecution could comment upon the evidence and whether defense counsel misconstrued a comment by the trial court as an order not to object when he kept objecting after the alleged "order"?

8. Whether this Court should grant certiorari due to alleged defects in the record that do not relate to any issue raised before the Colorado Supreme Court?

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INTRODUCTORY STATEMENT

This brief opposes a petition for writ of certiorari seeking review of People v. Rodriguez, 794 P.2d 965 (Colo. 1990) which affirmed petitioner's death sentence. A copy of this decision is attached as an appendix to the petition for certiorari. This attachment includes its own appendices of pertinent statutes and jury instructions for the penalty phase of trial. Because petitioner has attached numerous other appendices including his lengthy opening and reply briefs in the Colorado Supreme Court, respondent has attached its answer brief in the Colorado Supreme Court as Appendix A only in the interest of fairness and completeness.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

On December 12, 1986, a jury convicted petitioner of the first-degree murder of 54 year old Lorraine Martelli (v. 31, pp. 2-3). See Colo. Rev. Stat. § 18-3-102 (1986). It also convicted him of first-degree sexual assault, Colo. Rev. Stat. § 18-3-402 (1986); second-degree kidnapping of a sexual assault victim, Colo. Rev. Stat. § 18-3-302(3)(a) (1986); aggravated robbery, Colo. Rev. Stat. § 18-4-302 (1986) and aggravated motor vehicle theft, Colo. Rev. Stat. § 18-4-409 (1986). The jury also adjudicated Mr. Rodriguez a violent offender subject to mandatory sentencing under Colo. Rev. Stat. § 16-11-309 (1986). On December 13, 1986, the jury adjudicated him an habitual offender subject to mandatory life sentence pursuant to Colo. Rev. Stat. § 16-13-101(2) (1986) (v. 32, p. 63). The three prior felony convictions upon which this adjudication was based were a 1975 conviction for attempted burglary, a 1979 conviction for second-degree burglary, and a 1979 conviction for aggravated robbery (id. v. 1, p. 6). Petitioner's three previous felony convictions thus subjected him to a life sentence on the basis of a convic-

tion for any of the several felonies committed against Lorraine Martelli. See Colo. Rev. Stat. 16-13-101(2) (1986).

The prior aggravated robbery conviction represented a plea-bargained disposition of a criminal episode in which Mr. Rodriguez and two companions also kidnapped and sexually assaulted a woman named Judy Archuleta (v. 33, pp. 59, 88). Evidence of these other crimes against Mrs. Archuleta was presented at the penalty phase as a similar transaction to illustrate the motives petitioner had for killing witnesses to his crimes (v. 33, pp. 58-70; see also Instructions 8 and 9 set forth in Appendix B of People v. Rodriguez, supra at 994. Evidence of how he shot a man named George Stapleton was also presented at the penalty phase for the same limited purpose (see v. 33, pp.. 6-7; see also Instructions 8 and 10 in People v. Rodriguez, supra at 994).

Evidence of how petitioner robbed, raped, tortured, murdered, and stole from Lorraine Martelli was presented at the guilt phase not at the penalty phase. See People v. Rodriguez, supra at p. 983 (jury heard no evidence that went exclusively to show especially heinous, cruel or depraved aggravation.) This evidence showed that on November 14, 1984, petitioner and his brother Chris Rodriguez, Patricia Thomas, and David Martinez kidnapped Lorraine Martelli in her own car. People v. Rodriguez, supra at 969-970. It showed how Miss Martelli was held hostage for hours and driven around the Denver area. Id. During this

time, petitioner bought beer with Miss Martelli's money and she was vaginally raped and sodomized by petitioner and his brother Chris. Id. Although Chris Rodriguez told this victim that they would probably let her go, petitioner concluded that she had seen their faces and had to be killed. Id. He elaborated on his reasoning in subsequent correspondence stating:

> I had to kill her. If I wouldn't have killed her she would of pick my picture out of the mug books from the cops.... I had to do what I did because I new [sic] that I couldn't leave any witnesses alive to come to court on me later.

(People's Exhibit Q-2, identified; v. 28, pp. 61-62, admitted; v. 28, p. 68, ll. 8-9).

The subsequent killing of Miss Martelli may aptly be described as "particularly shocking and brutal almost beyond comprehension." See People v. Rodriguez, supra, p. 983 n.15. Petitioner applied a head-lock or strangle-hold to this victim with sufficient force to fracture her thyroid cartilage and cause abrasions to her skin (v. 24, pp. 41-46). He then inflicted shallow knife wounds around this victim's neck and chin (v. 24, pp. 38-40). These wounds were referred to as "torture or teasing" injuries by a pathologist (v. 24, pp. 38-40). The victim's face would also evidence black eyes and other bruises as the result of being beaten (v. 24, pp. 47-49). Afterwards, Frank Rodriguez inflicted approximately 28 deeper stab wounds on the victim (v.

24, pp. 62-63, 210-211). Four of these knife thrusts penetrated Miss Martelli's heart (v. 24, p. 56). Six other knife thrusts penetrated a lung causing it to collapse (v. 24, p. 69). These heart and lung wounds caused the victim to die through loss of blood (v. 24, p. 71).

The prosecution argued that the cruelty inflicted on Lorraine Martelli satisfied the statutory aggravator for especially heinous, cruel, or depraved killing (Colo. Rev. Stat. § 16-11-103(6)(j) (1986); e.g., v. 34, pp. 111-112). However, the prosecution also relied on other statutory aggravation, particularly, the aggravator for avoiding prosecution by killing a witness, Colo. Rev. Stat. § 16-11-103(6)(k) (1986) (e.g., v. 34, pp. 105-107). Indeed, the prosecution emphasized that when petitioner chose to murder Lorraine Martelli, he was on parole for aggravated robbery, had three prior felony convictions, and had just kidnapped and raped a victim who could identify him and return him to prison for the rest of his life (v. 34, pp. 105-107, 120-124, 170-171, 182-185). The prosecution described how Mr. Rodriguez had a propensity to kill persons who witnessed his crimes because of previous experiences where such witnesses survived and were able to identify him (v. 33, pp. 31-45). The prosecution thus argued that punishing Lorraine Martelli's murder by anything less than death would, in effect, impose no punishment beyond what Mr. Rodriguez would have received for the

several lesser felonies committed against this victim (e.g., v. 34, pp. 182-185).

Petitioner admitted that the prosecution proved the alleged aggravators including the "especially heinous and cruel" factor (v. 34, p. 139), and he even described the death of Lorraine Martelli as "heinous and terrible" (v. 34, p. 129). Petitioner argued that it would be a "travesty of justice" to put him to death "when lesser sentences were imposed on others" (v. 34, p. 145). Petitioner argued that the "physical evidence [of who did the killing] points to David Martinez" (id.).

Evidence supporting this claim included the fact that there were knife cuts on the little fingers of both of David Martinez' hands (v. 24, pp. 84-85). The folding knife which was the murder weapon had a defective locking mechanism which could allow the blade to fold and cut the person using it (v. 24, p. 66, ll. 15-19, p. 79, ll. 16-19). However, most of the major stab wounds "were fairly regular" as if "performed by a single pattern of force" (v. 24, p. 62, ll. 4-8). This suggested that the knife blade went "clean in and clean out" without collapsing (v. 24, p. 62, ll. 4-9, pp. 65-67). The one exception which showed oddly-shape skin portions was the result of the two wounds inflicted in the same place (v. 24, p. 62, ll. 10-22). In any event, there was simply no physical evidence that the murder weapon buckled upon being thrust into the victim's body even when it struck bone

(v. 24, pp. 65-69). An examination of this weapon also showed that despite a defective locking mechanism, it could be thrust in a manner that would not cause the person using it to be cut (v. 24, pp. 67-68).

Petitioner also argued that David Martinez may have sexually assaulted the victim (e.g., v. 34, p. 144, ll. 13-18). However, the evidence supporting this argument consisted of little more than the fact that certain unidentifiable hairs turned up on the victim's body. Admittedly, one of these hairs was a human limb hair with some characteristics which were similar to Martinez' limb hair. However, these characteristics still were insufficient to permit meaningful identification (v. 28, pp. 19-22). Moreover, this hair was found in the victim's "vaginal area," not inside her anus or vagina and Martinez unquestionably handled this unclothed victim in an attempt to help carry her to the trunk of her car (v. 24, p. 213, ll. 16-21).

Petitioner contended that his letters which described how he killed Lorraine Martelli to avoid prosecution were part of a hoax to obtain a lenient disposition of charges against a female prisoner named Margie Marquez (e.g., v. 24, p. 155, ll. 14-25). However, Margie Marquez appeared as a witness and admitted that she was never promised anything for turning over the letters and that, in effect, she turned them over "for free" (v. 29, p. 128, ll. 5-15).

Petitioner claimed that his intoxication on the date of the killing mitigated the killing as did his upbringing and background (v. 34, pp. 146-150). In this regard, he presented a narrative setting forth his life history, including his criminal and institutional records. This narrative was admitted at trial as defendant's Exhibit 38 (v. 33, p. 165, see also People v. Rodriguez, supra at 971). It will be hereinafter referred to as the "life history". Mr. Rodriguez also claimed that he was sorry for his offense (v. 34, pp. 150-151) and that his character contained other redeeming qualities such as the ability to work hard, improve himself, and be valued by his family (v. 34, pp. 152-156).

Finally, petitioner claimed that he was no longer a threat to anyone, particularly when incarcerated, and that the "blackness," "emptiness," and other aspects of prison life would be sufficient punishment (e.g., v. 34, pp. 133-134, 164-167). However, petitioner's own case suggested otherwise. His life history showed how he had attempted to escape in the past, how he had been affiliated with a prison gang which harassed black prisoners, and how he was believed to be responsible for burning another inmate's cell (see Appendix B, pp. 13-14). In addition, correspondence admitted as defendant's Exhibit 20 (v. 28, pp. 81-82), showed his intention to escape, his intention to traffic in drugs while incarcerated, and biases and threats toward other

prisoners (relevant portions of this exhibit were attached to the Answer Brief in the Colorado Supreme Court, now attached hereto as Appendix A). Testimony from Margie Marquez also showed petitioner's intention to traffic in drugs while incarcerated (v. 29, pp. 96-97, 145-146). Petitioner called a witness, Dr. Kent Wilson, who discussed his anti-social personality and background (v. 33, pp. 255-260; v. 34, pp. 42, 48). On cross-examination, this witness admitted that petitioner could influence other inmates in prison (v. 34, pp. 50-51), that petitioner found institutionalization "easy" or "comfortable" (v. 34, pp. 51-52, 58-59)., and that personalities like that of petitioner enjoy violence and tend to repeat their violent acts (v. 34, pp. 54-56). Another defense witness, Judy Scholl, testified on cross-examination regarding petitioner's ability to adapt in prison (v. 33, pp. 208-210), and his participation in racially-polarized gang violence while incarcerated (v. 33, pp. 208-209).

On December 17, 1986, the jury returned a verdict imposing the death sentence (v. 3, p. 753). This verdict was upheld by the Colorado Supreme Court in People v. Rodriguez, supra.

SUMMARY OF ARGUMENT

1. Exclusion of facts relating to prison conditions, lethal gas, and other cases in which the death penalty was not

sought presents no cognizable claim particularly where petitioner's evidence opened the door to much of the prosecutorial comment of which he now complains.

2. The prosecution's description of the victim's suffering and death in graphic, personalized terms, and references to the role of the jury did not deny petitioner an individualized sentencing determination.

3. The instructions, particularly when taken as a whole, would not have led a reasonable juror to believe that unanimity was required before any matter could be considered in mitigation.

4. Petitioner's constitutional rights were not implicated by instructions which allowed the jury discretion to find a death sentence inappropriate after that jury found beyond a reasonable doubt that there was statutory aggravation which outweighed any and all mitigation.

5. Petitioner's admission of the statutory aggravators, the overwhelming evidence of abuse, torture, and suffering distinct and apart from the causing of a death and the proof of other substantial statutory aggravation rendered harmless any failure to limit the aggravator for "especially heinous, cruel, or depraved" killings.

6. The jury instructions and statements of counsel sufficiently apprised the jury of the finality of its sentencing

decision.

7. The prosecution could comment upon the evidence and defense counsel did not misconstrue a comment by the trial court as an order not to object because he kept objecting after the alleged "order".

8. This Court should not grant certiorari due to alleged defects in the record that do not relate to any issue raised before the Colorado Supreme Court.

ARGUMENT

I.

EXCLUSION OF FACTS RELATING TO PRISON CONDITIONS, LETHAL GAS, AND OTHER CASES IN WHICH THE DEATH PENALTY WAS NOT SOUGHT PRESENTS NO COGNIZABLE CLAIM PARTICULARLY WHERE PETITIONER'S EVIDENCE OPENED THE DOOR TO MUCH OF THE PROSECUTORIAL COMMENT OF WHICH HE NOW COMPLAINS.

Petitioner complains that he was not allowed to present mitigating evidence on prison conditions including the possibility of escape and future dangerousness, the pain of dying from lethal gas, and the alleged factually disproportionate nature of death as punishment in this case. This issue was not specifically raised in petitioner's briefs in the Colorado Supreme Court (see Opening Brief in Colorado Supreme Court, set forth in Appendix 5 to Petition for Certiorari). Rather, it was raised indirectly through petitioner's complaints about improper prosecutorial argument (see Opening Brief in Colorado Supreme Court, e.g., pp. 50, 67). Accordingly, this court's review should be limited to the Colorado Supreme Court's treatment of petitioner's complaints about improper prosecutorial argument. Indeed, the prejudice alleged by the petition for certiorari is argument by the prosecutors, not evidence received by the jury.

The Colorado Supreme Court noted that some of this argument was improper, specifically, the statement that this case was worse than other murders in Colorado. People v. Rodriguez, supra at 978-979. However, the Colorado Supreme Court could properly conclude that given the circumstances of this case, this impropriety was insufficient to deny petitioner a fair trial. E.g., Darden v. Wainwright, 477 U.S. 168 (1986); Donnelly v. DeChristoforo, 416 U.S. 537 (1974). This disposes of petitioner's claim that he was not permitted to present facts showing the disproportionality of seeking the death penalty here, particularly since a proportionality hearing of the kind proffered by petitioner is unnecessary to an individualized sentencing determination. McCleskey v. Kemp, 481 U.S. 279 (1987); Pulley v. Harris, 465 U.S. 37 (1984).

Any complaint that petitioner was precluded from presenting evidence of prison conditions -- specifically the difficulty of escape, and the general discomfort -- is similarly meritless.

Such evidence goes neither to the character and background of a defendant nor to the nature and circumstances of his crime. People v. Thompson, 753 P.2d 37, 70 (Cal. 1988). Moreover, petitioner opened the door to prosecutorial comment in this area. He put his entire life history, including his institutional record into evidence. This institutional record included an escape from a juvenile facility, and an attempted escape from an adult facility (Life history pp. 8, 14). In addition, correspondence introduced by petitioner evidenced boasts that he would escape (see Defense Exhibit 20). These letters also evidence threats and prejudice toward other inmates and plans to sell drugs in prison (id.). Petitioner's evidence also showed racially-motivated gang activity in prison and other misbehavior, notably burning another inmate's cell (v. 33, pp. 208-209; Life history, pp. 13-14). Finally, petitioner's witnesses testified about his ability to adapt to confinement (v. 33, pp. 208-210; v. 34, pp. 51-53, 58-59), the violent propensities of his personality-type (v. 34, pp. 42, 48, 54-56), and his ability to influence other prisoners (v. 34, pp. 50-51).

Given this evidence, there was no error in the Colorado Supreme Court's holding that the prosecutor could comment on petitioner's future dangerousness or the possibility of escape. People v. Rodriguez, supra at 976. See Tucker v. Kemp, 762 F.2d 1480, 1484 (115h Cir. 1985); Brooks v. Kemp, 762 F.2d 1383,

1405-07 (11th Cir. 1985), vacated on other grounds, sub. nom., Kemp v. Brooks, 92 L. Ed. 2d 732 (1986); Campbell v. Kincheloe, 829 F.2d 1453 (9th Cir. 1987). See also High v. Kemp, 819 F.2d 988, 995-996 (11th Cir. 1987) (prosecutor may argue any reasonable inference which can be drawn from evidence).

Finally, evidence of the painfulness of execution by lethal gas was properly excluded as irrelevant to a jury evaluation of the crime and the offender's character and background People v. Thompson, supra at 70; Kordenbrock v. Scroggy, 680 F. Supp. 867, 910-911 (E.D. Ky. 1988), aff'd., 889 F.2d 69 (6th Cir. 1989). In this regard, the prosecutor's contrasting of the fate of Lorraine Martelli with a legal execution was not an improper comment which would cause the jury to abandon reason or objectivity. See, e.g., Darden v. Wainwright, supra; Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989); Brooks v. Kemp, supra at 1404-05; Commonwealth v. Travaglia, 467 A.2d 288, 301 (Pa. 1983). This is particularly true since the prosecutor argued that petitioner's execution would be as humane as possible because it would not involve the torture, raping, beating, and other indignities suffered by Lorraine Martelli, not because lethal gas was painless (v. 34, pp. 110-111).

II.

THE PROSECUTION'S DESCRIPTION OF THE VICTIM'S SUFFERING AND DEATH IN GRAPHIC, PERSONALIZED TERMS, AND REFERENCES TO THE ROLE OF THE JURY DID NOT DENY PETITIONER AN INDIVIDUALIZED SENTENCING DETERMINATION.

Petitioner complains that the prosecutors' references to the victim and her family violated South Carolina v. Gathers, 104 L. Ed. 2d 867 (1989); Booth v. Maryland, 482 U.S. 496 (1988); and Zant v. Stephens, 462 U.S. 862 (1983). He especially complains of comments asking jurors to imagine the discomfort of being raped or sodomized.

However, the comments complained of did not divert the jury's attention from the circumstances of the crime or the obvious effects of this incident which would have or should been known to petitioner. In this regard, the comments related to petitioner's moral culpability, and did not deprive him of the individualized sentencing determination required by Zant v. Stephens, supra.

In a capital sentencing proceeding, the jury does not attempt to decide whether particular elements have been proven but instead makes a unique individualized judgment regarding the punishment that a particular offender deserves. Zant v. Stephens, supra at 900 (Rehnquist, J., concurring). In California v. Ramos, 463 U.S. 992, 1008 (1983), this Court explained:

> In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar "central issue" from which the jury's attention may be divested. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury ..., the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment.

(emphasis added).

As this Court has consistently held, the factors considered by the capital sentencer must include "the character and record of the individual offender and the circumstances of the particular offense." Woodson v. North Carolina, 428 U.S. 280, 304 (1975) (emphasis added).

Clearly, the circumstances of the offense include the pain and suffering inflicted on a victim. Indeed, such pain and suffering provides a constitutionally acceptable means of making murderers eligible for the death penalty. E.g., Profitt v. Florida, 428 U.S. 242 (1976) (murder which is pitiless and unnecessarily tortuous to victim may render murderer eligible for death penalty). Thus, People v. Rodriguez, supra at 973-976 properly concluded that there was no violation of this petitioner's rights under Booth or Gathers.

An assessment of the circumstances of this cases from the

victim's viewpoint was particularly appropriate because:

> [A]t the penalty phase the jury decides a question the resolution of which turns not only on the facts but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weight the sympathetic elements of the defendant's background against those that may offend the conscience. In this process, one of the most significant considerations is the nature of the underlying crime. Hence, assessment of the offense from the victim's viewpoint would appear germane to the task of sentencing.

People v. Haskett, 640 P.2d 776, 790 (Cal. 1982); see also People v. Hovey, 749 P.2d 776, 795 (Cal. 1988) (prosecutor's remarks did not violate Booth where confined to matters obvious to any juror).

Moreover, efforts by the prosecutors to personalize the crimes against Lorraine Martelli were directly related to petitioner's moral culpability. Petitioner, was convicted of deliberate, first-degree murder, a conviction evidencing his ability to act intentionally and with an awareness of his actions. Consequently, petitioner knew or should have known that his victims would have suffered pain and discomfort when raped and sodomized. Consequently, petitioner knew or should have known that this killing denied his victim the chance to say "good-bye" to her loved ones or hear "good-byes" from them. See People v. Rodriguez, supra at 975. Similarly, petitioner knew or should

have known that Miss Martelli would never again write or receive letters, or socialize with friends, or work, or watch television. Id.

Such matters were simple, self-evident truths which personalized the victim's death in a manner which did not hold petitioner culpable for matters which could not be known or understood by him. Here, there was no submission of a detailed victim impact statement setting forth the victim's personal characteristics as well as specific instances of emotional trauma or hardship suffered by persons other than the victim. Compare Booth v. Maryland, supra at 497-506. Here, there was no detailing of specific instances of the suffering unknown to the offender such as a son's depression and insomnia or the ruined wedding of another family member. Id. Here, the prosecution correctly anticipated Booth, by declining to comment on how Lorraine Martelli's elderly mother who had relied on Lorraine for care, died a few weeks after her daughter's murder (see v. 33, p. 13, ll. 9-19). Similarly, the present case did not involve the presentation of opinions from family member or the other extensive information described in Booth, which could potentially turn the proceedings into a "mini-trial" on the victim's character and reputation.

Similarly, this case did not involve "extensive comments to the jury regarding the victim's character [which] were unnecessary to an understanding of the circumstances of the crime."

Compare South Carolina v. Gathers, supra, 109 S. Ct. at 2210 (emphasis added). Unlike Gathers, this case evidenced nothing like the detailed recitation of a lengthy prayer card whose contents were unknown to the offender. Here there was no effort to dwell on a victim's religious beliefs which had no connection to the offender's character or the circumstances of the crime. Accordingly, there is no federal constitutional issue for this court. The prosecutor's efforts to personalize the victim's death by referring to the normal, everyday things which were forever lost to Lorraine Martelli were proper under Colorado law. People v. Marin, 686 P.2d 1351 (Colo. App. 1983).

Moreover, the state has a legitimate interest in countering the mitigating evidence which a defendant is entitled to present, see, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982), by reminding the jury that the victim, like the defendant, is an individual whose death represents a unique loss of life. Booth v. Maryland, supra, 107 S. Ct. 2540 (White, Jr., dissenting). Here, petitioner's lengthy narrative of his life-history included many sympathy-evoking references to his childhood. See People v. Rodriguez, supra at 971. In addition, the jury was allowed to consider "mercy" for petitioner as well as any unspecified reason for not imposing a death sentence (see Instructions 20 and 26 set forth in People v. Rodriguez, supra at 997). Thus, there was no federal constitutional violation in personalizing the victim and

in simply reminding the jury that she had a family. Kordenbrock v. Scroggy, supra at 896. Accord Brooks v. Kemp, supra at 1409; Moon v. State, 375 S.E.2d 442 (Ga. 1988); State v. Rice, 757 P.2d 889, 906 (Wash. 1988). Indeed, petitioner discussed the victim's family and character in his closing argument stating that she was a "wonderful woman" whose loss to her family was "enormous" (v. 34, p. 165). Accordingly, petitioner should not complain of references to the victim or her family made during the prosecution's rebuttal (see v. 34, pp. 180-182). The effect of such references could only be cumulative to petitioner's own argument. See also State v. Clark, 108 N.M. 288, 302, 772 P.2d 322, 333-34, cert. denied, 110 S. Ct. 291 (1989) (prosecutor's argument may respond to defendant's discussion of life of victim).

Finally, there was simply no Eighth Amendment violation in the prosecution's references to the jury as the conscience of the community. "[I]t is the function of the sentencing jury to express the conscience of the community on the ultimate question of life or death." Booth v. Maryland, supra at 504. Here, there was no effort to have the jury substitute publicity for evidence and any references to its function as the conscience of the community simply served to underscore the seriousness of the matter and the need for fairness to both sides.

III.

THE INSTRUCTIONS, PARTICULARLY WHEN TAKEN AS A WHOLE, WOULD NOT HAVE LED A REASONABLE JUROR TO BELIEVE THAT UNANIMITY WAS REQUIRED BEFORE ANY MATTER COULD BE CONSIDERED IN MITIGATION.

Petitioner complains that a particular instruction violated Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 108 L. Ed. 2d 369 (1990) by requiring unanimity before the jury could consider a mitigating factor. The Colorado Supreme Court's treatment of this claim is dispositive People v. Rodriguez, supra at 980-982. First, it correctly held that the first paragraph of instruction 21, the alleged cause of this "Mills violation" was, at worst, ambiguous. Id. at 980. This paragraph stated as follows:

> If in the first two steps of your deliberations you have made unanimous findings that the prosecution has proven beyond a reasonable doubt that one or more aggravating factors exist and that no mitigating factors exist, or that a mitigating factor or factors exist, you must now decide whether the prosecution has proven that any factors in mitigation do not outweigh the aggravating factor or factors.**1

1** Any ambiguity in this first paragraph could also be construed as simply allowing the jurors to unanimously recognize that a mitigator exists, an occurrence that could only benefit petitioner, and as properly directing the jury not to stop deliberating upon such a unanimous finding but rather to continue to the next step.

Any suggestion that this paragraph required that the jurors unanimously agree to the existence of a mitigator before weighing it against aggravation is offset by the language in this same paragraph stating that jurors must decide whether the prosecution has proven that any factors in mitigation do not outweigh aggravation. See People v. Davis, 794 P.2d 159, 194 (Colo. 1990) (nearly identical instruction did not create unanimity requirements). Moreover, this instruction, even reviewed in isolation, did not mandate unanimity as a prerequisite to the consideration of any matter in mitigation in the next step of deliberation when mitigation is weighed against aggravation. Rather, it informed the jurors that they were to weigh aggravation against any and all mitigation and that if one juror believed that mitigation outweighed aggravation, the verdict would be life imprisonment. Id.; see also People v. Rodriguez, supra at 980-982. It stated:

> If one or more of the jurors believe that a mitigating factor or factors outweigh the aggravating factor or factors found to exist, then the jury shall enter a verdict of life imprisonment.

Id. (emphasis added).

In any event, any ambiguity in the first paragraph of Instruction No. 21 was unquestionably cured by Instructions 11, 15 and 22. See People v. Rodriguez, supra at 996-97. Instruction 11 clearly removed mitigation from any burden of proof requirement and instructions 15 and 22 dispelled any conceivable

unanimity requirement. See, e.g., United States v. Hoffner, 777 F.2d 1423 (10th Cir. 1985); (relevant inquiry is whether instructions as a whole inform jury of their duties) People v. Travis, 192 Colo. 169, 558 P.2d 579 (1976) (same).

Accordingly, petitioner would argue:

> Each and everyone of you individually can rely on any factor you wish to return a life sentence. You don't have to be unanimous on those factors.

(v. 34, p. 140).

Such argument, uncontested by the prosecution, only reinforced instructions 15 and 22 and the latter portions of instruction 21 in dispelling any ambiguity regarding unanimity. Cf. People v. Wade, 44 Cal. 3d 975, 244 Cal. Rptr. 905, 750 P.2d 794, 805 (1988) (argument of counsel prevented jury from being misled by ambiguity in instruction).

IV.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT IMPLICATED BY INSTRUCTIONS WHICH ALLOWED THE JURY DISCRETION TO FIND A DEATH SENTENCE INAPPROPRIATE AFTER THAT JURY FOUND BEYOND A REASONABLE DOUBT THAT THERE WAS STATUTORY AGGRAVATION WHICH OUTWEIGHED ANY AND ALL MITIGATION.

Petitioner complains that the jury was given unbridled, unguided discretion and allowed to consider an unlimited number of factors against the accused. This argument is based largely upon

language in instruction no. 15 which applies only to the fourth and final step of jury deliberations under Colo. Rev. Stat. § 16-11-103(2)(a) (1986).**2 Significantly, the instructions only permitted the jury to reach the fourth step about which petitioner complains after the jury concluded beyond a reasonable doubt that the prosecution proved statutory aggravation and after the jury also concluded beyond a reasonable doubt that such aggravation was not outweighed by mitigation. (See Instructions 1, 3, 15, 16 and 21.) Accordingly, before the jury could exercise the unchannelled discretion of which petitioner complains, it had to first conclude beyond a reasonable doubt both that statutory aggravation existed and that this aggravation was not outweighed by mitigation. (Id.). Such mitigation included any unspecified factor "which constituted a reason for not imposing a death sentence." (See Instruction 20.) In this regard, before the jury even reached the phase of which petitioner complains, its discretion was constitutionally channelled by the requirement of a finding of statutory aggravation which narrowed the class of persons eligible for the death penalty. See, e.g., Zant v.

2** This fourth and final step appears as the third step in this statute. See Colo. Rev. Stat. § 16-11-103(2)(a)(III) (1986). However, it appeared as the fourth step of deliberations because instruction no. 15 restated a portion of the middle statutory step as an independent phase of deliberations. (See Petition for Certiorari, p. 31).

Stephens, supra; Lowenfield v. Phelps, 484 U.S. 231 (1988). Similarly, before the jury reached the phase of which petitioner complains, it had performed a weighing process in which petitioner could present anything in mitigation which pertained to his character or background or the circumstances of the crime. This afforded him a constitutionally adequate, individualized sentencing determination. See, e.g., Lockett v. Ohio, 483 U.S. 586 (1978), Woodsen v. North Carolina, 428 U.S. 280 (1976).

Here, the constitutional prerequisite for narrowing jury discretion and affording sufficient opportunity for mitigation were satisfied before the jury could even begin the final phase of which petitioner complains. Thus, the Colorado Supreme Court properly treated this issue as one which did not implicate petitioner's constitutional rights. People v. Rodriguez, supra at 986-987. It then found that the instructions were not inconsistent with Colorado's statutory scheme and that this claim therefore lacked merit. Id.

Petitioner also complains that instruction 21 allowed the weighing of aggravation and mitigation to be based on a totality of circumstances thus allowing the jury to consider irrelevant, prejudicial material (Petition for Certiorari, p. 32). However, petitioner again fails to state a federal constitutional claim and the opinion below is dispositive. It properly held that once a death sentencing scheme narrows the class of offenders eligible

for the death penalty, the federal constitution does not prohibit the consideration of aggravating facts other than statutory aggravators. People v. Rodriguez, supra at 986. Moreover, the jury was instructed to decide the case on the basis of the evidence and the instructions, see Instruction No. 1, Id. at 993, and the court below found that the death sentence was not the product of passion, prejudice, or other arbitrary factors. Id. at 990-991. This finding was made pursuant to a statutory obligation imposed on the Colorado Supreme Court, Id., and petitioner's claims of passion and prejudice are simply unfounded.

V.

PETITIONER'S ADMISSION OF THE STATUTORY AGGRAVATORS, THE OVERWHELMING EVIDENCE OF ABUSE, TORTURE, AND SUFFERING DISTINCT AND APART FROM THE CAUSING OF A DEATH AND THE PROOF OF OTHER SUBSTANTIAL STATUTORY AGGRAVATION RENDERED HARMLESS ANY FAILURE TO LIMIT THE AGGRAVATOR FOR "ESPECIALLY HEINOUS, CRUEL, OR DEPRAVED" KILLINGS.

Petitioner complains that the Colorado Supreme Court misapplied Clemons v. Mississippi, 108 L. Ed. 2d 725 (1990) in holding the lack of a limiting definition for the "especially heinous cruel or depraved" aggravator was harmless. This argument lacks merit.

Here, the Colorado Supreme Court concluded that if the ag-

gravator had been properly limited to include only murders which were conscienceless or pitiless or unnecessarily tortuous to the victim, see Profitt v. Florida, supra, the jury would have concluded that the commission of the murder satisfied the broader definition of "especially heinous, cruel or depraved." People v. Rodriguez, supra at 983-84. In this manner alone, the Colorado Supreme Court found the lack of a limiting definition harmless beyond a reasonable doubt. Id. at 984.

Alternatively, the Colorado court also noted that no evidence was introduced in support of this aggravator which would not have been admitted for other purposes and that other aggravators were established by overwhelming evidence. Id. at 983-984. For these alternative reasons, the court below held that the inclusion of this aggravator was harmless beyond a reasonable doubt.

Both of these alternative methods of harmless error analysis are acceptable under Clemons, and because the record amply supports the Colorado court's holdings, certiorari should be denied on this issue. Id. Walton v. Arizona, 111 L. Ed. 2d 511, 528 (1990) (a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death

penalty). See also Lewis v. Jeffers, 111 L. Ed. 2d 606, 624 (1990) (de novo finding by a state appellate court that a particular offense is especially heinous or depraved is arbitrary or capricious if and only if no reasonable sentencer could have so concluded).

The court below properly concluded that the jury would have found the aggravator had they been given a proper limiting instruction. People v. Rodriguez, supra at 984. First, defense counsel admitted proof of this and other aggravators and even described the killing as "heinous and terrible." Petitioner now tries to characterize this admission as an acknowledgement of a "constitutional truism" that an ordinary person could honestly believe that every unjustified and intentional taking of human life is especially heinous." (Petitioner for Certiorari). However, this is wishful thinking. The admissions at trial were made to the jury in evidentiary terms; they were not a constitutional law argument to the court. Defense counsel stated:

> Do these aggravating factors exist, there is no question that they do. Mr. Silverman [the Prosecutor] put them up for you in graphic display, there is no question that they have been proven beyond a reasonable doubt.

(v. 34, p. 139, emphasis added).

> Make no mistake about my argument, the death of Lorraine Martelli was a heinous and terrible death.

(v. 34, p. 129, emphasis added).

Moreover, the Colorado Supreme Court's consideration of the evidence, People v. Rodriguez, supra at 984, clearly enabled it to find that the jury would have found the aggravator were it properly defined. See Walton v. Arizona, supra. This determination is was one which a reasonable sentencer could make, see Lewis v. Jeffers, supra, and thus certiorari should be denied. Indeed, the Colorado court noted how the victim was kidnapped, repeatedly raped, sodomized, beaten, and humiliated before being "murdered in a manner indicating that the defendant intended to torture her before she died." People v. Rodriguez, supra at 984. This description of the killing even understates the evidence which showed fractured thyroid cartilage from choking, torture cuts around the neck and chin and 28 deeper stab wounds only 10 of which contributed to the victim's death. In any event, the Colorado court's holdings effectively recognized that the jury could not have found the aggravator simply because a murder occurred and thus the Eighth Amendment problem identified by Maynard v. Cartwright, 486 U.S. 356 (1988) is not present here.

Indeed, the evidence that petitioner killed the victim in a conscienceless, pitiless, and unnecessarily tortuous manner was so overwhelming it excluded any reasonable possibility that the jury found the "especially heinous, cruel and depraved aggravator" simply because a killing had occurred. The evidence showed

that while Lorraine Martelli died as the result of approximately 10 knife-thrusts to the heart and lungs, she also suffered another 18 knife-thrusts to other body parts, plus "torture-cuts" to her chin and throat, plus a choking and facial beating, plus traumatic vaginal and anal penetrations (e.g., v. 24, pp. 27-32, 41-51, 60-64; v. 28, pp. 22-23).

For the jury to have found aggravation simply because a killing occurred, it necessarily would have had to disbelieve all the evidence of multiple non-lethal knife-thrusts, torture cuts, choking, beating, raping and sodomizing, but still conclude that the killing was "especially heinous and cruel and depraved" because of the several lethal stab wounds to the heart and lungs. Clearly the jury could not have found this murder "especially heinous, cruel or depraved" simply because someone died. Thus, the Colorado Supreme Court acted reasonably in concluding that the jury would have found the aggravator as properly defined. People v. Rodriguez, supra at 984; see Lewis v. Jeffers, supra.

Similarly, the court below acted reasonably in finding that the inclusion of the "especially cruel heinous or depraved" aggravator was harmless beyond a reasonable doubt. People v. Rodriguez, supra at 983-984. This aggravator was supported entirely by evidence of the facts and circumstances of the offense introduced in the guilt phase. These facts and circumstances were also admissible to prove other aggravators and to

assist the jury in the weighing of aggravation and mitigation. Id. at 983.

Indeed, once any one valid statutory aggravator was established, there was no constitutional prohibition to consideration of the facts and circumstances of the offense as non-statutory aggravators. People v. Rodriguez, supra at 986. Colorado statute provides for the admission of evidence of the nature of the crime in death-sentencing proceedings. See Colo. Rev. Stat. § 16-11-103(1)(b) (1986). Thus, the court below reasonably held that such evidence was so independently relevant to matters other than the invalid aggravator as to make inclusion of the invalid aggravator harmless. People v. Rodriguez, supra at 984. Indeed, evidence of the nature of the offense supported, among others, the aggravator for avoiding arrest or prosecution by intentionally killing a witness to an offense. Id. at 983 n.16. This aggravator was more crucial to the prosecution's case for a death sentence than the "especially heinous, cruel or depraved aggravator." The aggravator of killing to avoid arrest and prosecution was obviously related to the prosecution's position that petitioner had a strong inclination to kill witnesses to his efforts to rob or rape because of previous experience where such witnesses survived and were able to identify him (v. 33, pp. 31-45). It also related to the prosecution's argument that petitioner believed he had nothing to lose by killing Miss Martelli due to

his parole status, his prior convictions and her ability to identify him as a kidnapper and rapist vulnerable to a life sentence for his recidivism (v. 34, pp. 105-107, 120-124, 170-171, 182-185). Accordingly, the court below reasonably concluded that the "especially heinous, cruel and depraved" aggravator was not overly emphasized and its inclusion was harmless. People v. Rodriguez, supra at 983-984.

VI.

THE JURY INSTRUCTIONS AND STATEMENTS OF COUNSEL SUFFICIENTLY APPRISED THE JURY OF THE FINALITY OF ITS SENTENCING DECISION.

The Colorado Supreme Court properly concluded that this case evidenced no violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). People v. Rodriguez, supra at 984-86. Caldwell holds that a jury may not be led to believe that the responsibility for determining the appropriateness of an offender's death sentence lies elsewhere. Id. at 329. In other words, a jury should not be misled into feeling less responsible than it should for the sentencing decision. Darden v. Wainwright, supra at 184; Parks v. Brown, 860 F.2d 1545, 1549 (10th Cir. 1988). In this regard, statements or instructions which lead juries to believe that courts may also exercise sentencing functions are disallowed

because jurors might not understand that courts are limited in their ability to review the sentencing discretion of juries. See Parks v. Brown, supra at 1549 n.3. Finally, statements or instructions which are challenged as diminishing the finality of the jury's sentencing decision should be evaluated in the context in which they are made. See Darden v. Wainwright, supra at 179; Parks v. Brown, supra at 1550.

Here, the Colorado Supreme Court properly rejected allegations that certain instructions or statements led the jury to believe that the sentencing decision as to the appropriateness of the death penalty rested elsewhere. In particular, it noted how Instruction No. 2 unambiguously instructed the jurors of their "awesome responsibility" for the appropriateness of a death sentence. People v. Rodriguez, supra at 985. It also noted how this sense of responsibility was reinforced by certain statements of counsel. Id. Once again, the Colorado Supreme Court understated the evidence supporting its decision. Additional statements of counsel so thoroughly reinforced the jury's sense of responsibility as a sentencer that there can be no serious allegation of "Caldwell error" in this case.

The prosecution stated:

> Jail is not enough. There has to be more. There is more. There is the death penalty.
>
> There are two options you have in terms of sentencing, life imprisonment or death... Those are still your options; only two of

> them; life imprisonment or the death penalty. Its a difficult decision. I don't want to minimize it for you....

(v. 34, p. 113, ll. 5-22).

> The defendant was undeterred by the death penalty because he though no jury would ever give it to him. But the People submit that you are the jury.

(v. 34, p. 122, l. 25).

> We think we have all people [jurors] who can follow the law and impose the death penalty when it is appropriate as it is here....

(v. 34, p. 124, ll. 8-10).

> [p]utting someone to death is certainly not a pleasant proposition....

(v. 34, p. 125, ll. 9-10).

> We have read the bood [sic] of the Life of Frank D. Rodriguez. The People submit its a book of murder and cold-blooded violence against completely innocent citizens of Denver.... Let's make sure this is the final chapter, ladies and gentlemen. Let's close the book on Frank Rodriguez. Return a verdict of death.

(v. 34, p. 126, ll. 1-8).

This final statement using the analogy of closing the book of the life of Frank Rodriguez graphically reminded the jury that their role was that of deciding whether defendant would live or die.

Similarly defense counsel made the following general remarks in his summation:

> Frank Rodriguez will be in prison....
>
> The only question is who will decide when he dies? Will it be you or will it be God?

(v. 34, p. 127, ll. 16-17).

> It is possible for us to accomplish the purposes of protection of society and the punishment of Frank Rodriguez without taking his life, without killing. It is not necessary to take his life to punish him and to protect us.

(v. 34, p. 128, ll. 11-18).

Defense counsel then discussed the differences between the guilty and penalty phases of trial stating:

> Now the question before you is totally different. Must this man die in the gas chamber in Canon City....

(v. 34, p. 129, ll. 21-24).

> Now our society insists a person not be killed unless twelve members of this community are unanimously very, very certain of the heavy presumption we have always had in our society in favor of life has been overcome. It is your task to determine whether this case is one in which we can say with unshakeable confidence that this man must die.

(v. 34, p. 130, ll. 8-13).

> We can't tell you, but is it too much to ask that you should be convinced to your moral satisfaction before a person should die?.... Obviously, if you reach that moral decision inside and you agree that they have proven beyond a reasonable doubt that he should die then that should be your verdict....

(v. 34, pp. 138-139).

Defense counsel later criticized the prosecutor's summation and even equated a death verdict to an act of killing:

> It's easier to kill somebody if you don't think they're human and that's the point of their argument.

(v. 34, pp. 154-155).

In a similar context, defense counsel then discussed petitioner's letters and stated:

> They were supposed to make him look as vicious as possible so they [the prosecutors] could come into court and blow him up and present them to you and inflame the passions in you to kill him....
>
> You can't kill him for the terrible things he says in these letters.
>
> The prosecutor will say well, we're not telling you to kill him for that; we're telling you to kill him for what he does.

(v. 34, pp. 155-156).

Defense counsel then commented on witness Judy Archuleta stating:

> There is no question she was raped, but did she have to come into court and twist the evidence and change the facts to try to convince you to kill him?

(v. 34, p. 156, ll. 8-141).

> [The prosecutor] is urging you to kill Frank Rodriguez because of the Archuleta case, why did he let them plea bargain to aggravated robbery in 1979?

> If the case wasn't strong enough then to go to trial and get a conviction, how can it be enough to kill Frank Rodriguez today?

(v. 34, p. 158. 11. 3-12).

> The prosecutor wants you to kill Frank Rodriguez on the testimony of Patricia Thomas and Judy Archuleta....

(v. 34, p. 159, 11. 19-21).

In a different context, defense counsel stated:

> There is no way you can avoid the responsibility of voting to take the life of another human being and place it on your fellow jurors. It has to be your decision. Frank Rodriguez is entitled to twelve separate verdicts.

(v. 34, p. 160, 11. 8-12).

Finally, in closing his argument, defense counsel stated that it was not necessary to kill Frank Rodriguez and that each juror held the power to stop such unnecessary killings (v. 34, pp. 166-168).

Here, rather than causing "Caldwell error," arguments of counsel completely eliminated it.

Granted, petitioner also complains about Instruction Nos. 23, 24, a preliminary instruction and the verdict form. However, none of these items diminished the jury's sense of responsibility as a sentencer whose role was to determine the appropriateness of a death sentence. See, e.g., Caldwell v. Mississippi, supra at 329. This is particularly true when these items are viewed in

context. See, e.g., Parks v. Brown, supra at 1550. Indeed, the proper inquiry is what a reasonable juror would have understood the entire charge or set of instructions to mean. California v. Brown, 479 U.S. 538, 541 (1987); See Mills v. Maryland, supra.

No reasonable juror could have understood Instruction Nos. 23 or 25 as diminishing his sentencing responsibility for determining the appropriateness of a death sentence. Neither directive was intended to describe the jury role in sentencing, as this function was adequately performed by Instruction No. 2. Rather, Instruction No. 23 served to inform the jury how the death penalty would be carried out by prison personnel. It told the jurors to assume that their death sentence would be carried out in this manner if imposed by the court. However, it did not substitute the court for the jury as the sentencer or ultimate arbiter of the penalty's appropriateness particularly when placed in context. Similarly, Instruction No. 25, in context, could only serve to inform the jury what would happen if it found life, not death to be appropriate. To read this instruction as rendering the entire sentencing proceeding an exercise in futility because the defendant would in any event receive a life sentence is simply an unreasonable interpretation of this directive.

Similarly, the preliminary instruction of which petitioner complains (Petition, p. 46) only reinforced the jury's understanding that it exercised the sentencing functions with the

court exercising a ministerial function under which it will enter a sentence of life or death pursuant to the jury's determination. Finally, the verdict forms of which petitioner complains, scrupulously followed Colorado's statutory scheme for finding aggravation, for balancing aggravation and mitigation, and lastly, for making a statutorily-mandated finding of appropriateness. This process in no way diminished the jury's role as a sentencer particularly when read in context with Instruction No. 15 which described how this final statutorily-mandated phase was a decision solely in the discretion of the jury as to whether petitioner should be sentenced to death or life imprisonment. Placing petitioner's complaints in proper context thus shows a complete absence of "Caldwell error."

VII.

THE PROSECUTION COULD COMMENT UPON THE EVIDENCE AND DEFENSE COUNSEL DID NOT MISCONSTRUE A COMMENT BY THE TRIAL COURT AS AN ORDER NOT TO OBJECT BECAUSE HE KEPT OBJECTING AFTER THE ALLEGED "ORDER".

Petition complains of misconduct by the prosecution during closing argument. To the extent that such complaints have already been addressed in parts I and II, supra, they deserve little comment here. This is particularly true because the Colorado Supreme Court's thorough analysis of these complaints is

dispositive. People v. Rodriguez, supra at 971-979. In this analysis the court below considered each of petitioner's complaints as if an objection had been made below. Id. at 972. This analysis thus undermined petitioner's contention that he was effectively ordered not to object when the trial court cautioned him to let the prosecutor finish his argument. Id. at 990 (see also Petition for Certiorari, p. 51). Moreover, as the Colorado Supreme Court recognized, the trial court's comment to let the prosecution finish his argument could not have reasonably been construed by defense counsel as foreclosing further valid objections. Id.

Petitioner also complains about the "instructional context" of closing argument (Petition, p. 52). However, the Colorado Supreme Court's analysis of the trial court's rejection of a tendered defense instruction on prejudice, bias, public opinion and sympathy is again dispositive. People v. Rodriguez, supra at 987-88. While such an instruction would have been proper during a guilt trial, it was properly refused in a penalty phase. See, e.g., California v. Ramos, supra.

Petitioner's alleging of "many instances of misconduct" by the prosecutors (Petition, p. 52) thus fails to establish grounds for certiorari, given the Colorado Supreme Court's treatment of these issues. People v. Rodriguez, supra at 971-980. This analysis adequately addressed the constitutional issues raised by

petitioner particularly those relating to Booth and Gathers.

The court below also found that there were some instances of misconduct at trial, specifically references to the cost of life imprisonment and to knowledge that this was a worse than average first-degree murder. Id. at 978-979. However, it properly found such errors harmless beyond a reasonable doubt given the overwhelming evidence of aggravation in this case. Id. at 979.

Other instances of misconduct now raised by petitioner similarly do not present grounds for certiorari. A prosecutor may use strong, emotional language to emphasize the appropriateness of a death sentence or the ends such a sentence serves. See, e.g., Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986); Brooks v. Kemp, supra at 1404-05. Accordingly, the complaint that prosecutors used graphic language or personalized the victim's death does not state a federal constitutional claim. See Darden v. Wainwright, supra; Coleman v. Brown, supra. Such language was appropriate under Colorado law. People v. Marin, supra, and the disposition below therefore does not invite review by this court.

Similarly, prosecutors may argue reasonable inferences from the evidence. High v. Kemp, supra; Tucker v. Kemp, supra. Accordingly, petitioner states no federal constitutional claim in complaining about comment on matters set forth in evidence intro-

duced by him (e.g., Petitioner's life history and correspondence). Such evidence set forth his own racial biases and threatening remarks toward other inmates, his escape efforts, his gang and drug activity and his violent propensities (id. at pp. 8-9, 13-14; v. 33, pp. 208-210; v. 34, pp. 42, 48, 54-58). Consequently, petitioner's dangerousness while incarcerated was in evidence. See Tucker v. Kemp, supra; Brooks v. Kemp, supra at 1405-07; Campbell v. Kincheloe, supra, see also People v. Poggi, 45 Cal. 3d 306, 246 Cal. Rptr. 886, 753 P.2d 1082 (1988) (prosecutor could suggest that defendant could present danger of sexual assaults upon other inmates).**3

VIII.

THIS COURT SHOULD NOT GRANT CERTIORARI DUE TO ALLEGED DEFECTS IN THE RECORD THAT DO NOT RELATE TO ANY ISSUE RAISED BEFORE THE COLORADO SUPREME COURT.

Petitioner complains that the record was inadequate. However, he cannot complain that it was inadequate with regard to

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3** A final complaint of petitioner's unfairly takes a prosecutor's comments out of context (see Petition, p. 55). He claims that the prosecutor said he would be parole-eligible in 20 years. In context, the prosecutor mentioned the legal possibility of parole in 20 years but then told the jury to assume that their choice was the death penalty or death in prison from natural causes in 50 years (v. 34, p. 113).

any issue finally litigated before the Colorado Supreme Court. See 28 U.S.C. § 1257 (1987). In this regard, a stipulation by the prosecution along with the Colorado Supreme Court's decision to review allegations of prosecutorial misconduct as if there were contemporaneous objections enabled petitioner to litigate each of the nine issues raised in the Opening Brief despite any alleged defect in the record. The prosecution stipulated that petitioner filed a motion to strike aggravating factors and that certain instructions were tendered. (See Stipulation included in Petitioner's appendices.) Similarly, the Colorado Supreme Court even considered the consequences of petitioner's unofficial version of a transcript and found that even if petitioner's unreported version was correct there was no reversible error. People v. Rodriguez, supra at 990.

Petitioner suggests that he was prejudiced in his ability to raise other issues such as competency and jury composition. However, on appeal to the Colorado Supreme Court he did not raise or finally litigate the trial court's disposition of such issues. Rather, he litigated nine other issues in his Opening Brief. Thus, there is no final decision by the Colorado Supreme Court on issues such as competency or jury composition which can be reviewed by this court. See New York Times Co. v. Jascalevich, 439 U.S. 1317, 1318 (1978).

Moreover, petitioner was precluded from raising any such

additional issues before the Colorado Supreme Court not by the inadequacy of the record but rather by his inability to brief other such issues within a reasonable time. See People v. Rodriguez, supra at 971. Nearly 2 years passed between the docketing of this appeal in the Colorado Supreme Court; and the filing of a partial opening brief by petitioner. Id. This lengthy period of time should have been adequate to enable petitioner to raise all meritorious issues before the Colorado Supreme Court and any preclusion of other issues by the refusal of the court below to further delay this appeal should not constitute grounds for this court's review. Indeed, the hallmark of effective advocacy is that of narrowing the issues on appeal not raising every conceivable claim. E.g., Burger v. Kemp, 97 L. Ed. 638 (1987); Jones v. Barnes, 463 U.S. 745 (1983). Accordingly, the inability of petitioner to finally litigate other claims in the Colorado Supreme Court is not a basis for review by this court at this time.

CONCLUSION

The petition for for writ of certiorari should be denied. It fails to show violation of a federal constitutional right. It similarly fails to present a novel claim not previously addressed by this court or to establish a departure from precedent.

FOR THE ATTORNEY GENERAL

RICHARD H. FORMAN
Solicitor General
Counsel of Record

ROBERT M. PETRUSAK
Assistant Attorney General
Appellate Section

Attorneys for Respondent

110 Sixteenth Street, 10th Floor
Denver, Colorado 80202
Telephone: 620-4540

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, this 12th day of December 1990, addressed as follows:

Michael J. Heher
Deputy State Public Defender
110 Sixteenth Street, Room 800
Denver, CO 80202